Supreme Court, U.S.
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In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

International Brotherhood of Electrical Workers, Local Union No. 46, *Petitioner*,

v.

Trig Electric Construction Co., a Washington corporation; Lydig Construction, Inc.; Fidelity and Deposit Company of Maryland; and Department of General Administration, *Respondents*.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

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PETITION FOR A WRIT OF CERTIORARI

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46 PP

QUESTION PRESENTED

State public works lien statutes typically permit employee benefit plans to recover unpaid benefit contributions from third-party contractors and their surety bonds, neither of which are signatory to collective bargaining agreements. The courts of appeals are in conflict about whether these statutes are preempted by ERISA. Does ERISA preempt these statutes?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 46,
Petitioner,

v.

TRIG ELECTRIC CONSTRUCTION CO., A WASHINGTON CORPORATION; LYDIG CONSTRUCTION, INC.; FIDELITY AND DEPOSIT COMPANY OF MARYLAND; AND DEPARTMENT OF GENERAL ADMINISTRATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

The International Brotherhood of Electrical Workers, Local Union No. 46, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Washington in this case.

OPINION BELOW

The opinion of the Washington State Supreme Court (App., *infra,* 1a-22a) is reported at 13 P.3d 622. The state superior court did not issue an opinion explaining its summary

judgment order from which the appeal to the state supreme court was taken. (App., *infra,* 23a, 24a)[1]

JURISDICTION

The Washington Supreme Court entered its judgment on November 16, 2000. (App., *infra,* 1a) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Section 514(a) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1144(a):

> . . . the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . .

ERISA Section 514(c)(1), 29 U.S.C. § 1144(c)(1):

> The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. . . .

Revised Code of Washington (RCW) 39.08.010:

> Whenever any . . . body acting for the state or any county or municipality or any public body shall contract with any person or corporation to do any

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[1] The reported opinion's statement to the contrary is incorrect. (App., *infra,* 4a, n.1) No stated grounds for the trial court's decision appear in the record (App., *infra,* 24a); the "Memorandum Decision" cited in the footnote to the state supreme court's opinion was a letter ruling issued by the trial judge in a different case involving different parties, different facts, and different counsel. (R.215, 216)

work for the . . . municipality, or other public body, city, town, or district, such . . . body shall require the person or persons with whom such contract is made to make, execute, and deliver to such . . . body a good and sufficient bond, with a surety company as surety, conditioned that such person or persons shall faithfully perform all the provisions of such contract and pay all laborers, mechanics, and subcontractors and materialmen, and all persons who supply such person or persons, or subcontractors, with provisions and supplies for the carrying on of such work, which bond in cases of cities and towns shall be filed with the clerk or comptroller thereof, and any person or persons performing such services or furnishing material to any subcontractor shall have the same right under the provisions of such bond as if such work, services or material was furnished to the original contractor. . . .

RCW 60.28.010(1):

Contracts for public improvements or work, other than for professional services, by the state, or any county, city, town, district, board, or other public body, herein referred to as "public body", shall provide, and there shall be reserved by the public body from the moneys earned by the contractor on estimates during the progress of the improvement or work, a sum not to exceed five percent, said sum to be retained by the state, county, city, town, district, board, or other public body, as a trust fund for the protection and payment of any person or persons, mechanic, subcontractor or materialman who shall perform any labor upon such contract or the doing of said work, and all persons who shall supply such person or persons or subcontractors with provisions

and supplies for the carrying on of such work. . . . Every person performing labor or furnishing supplies toward the completion of said improvement or work shall have a lien upon said moneys so reserved. . . .

STATEMENT

The petitioner Union sued in King County, Washington to foreclose its liens for unpaid employee benefit contributions attributable to work performed on a state community college construction project. The foreclosure action was based on Washington's public works lien statutes, RCW 39.08 and 60.28. The state superior court dismissed the petitioner's suit on respondents' motion for summary judgment. The Washington Supreme Court accepted direct review of the case and affirmed the dismissal, deciding in a 5-4 ruling that petitioner's claims were preempted by ERISA.

A. Facts

Under a collective bargaining agreement between Trig Electric Construction Co. and the Union, Trig was required to pay monthly employee benefit contributions to ERISA trust funds on the basis of hours worked by its employees. Trig subcontracted with respondent Lydig Construction, Inc. to perform the electrical work on a construction project at Bellevue Community College.

As required by RCW 39.08, Lydig obtained a surety bond from respondent Fidelity and Deposit Company of Maryland to protect, among others, all workers performing labor on the project. And under RCW 60.28, respondent Department of General Administration withheld a retainage trust fund from Lydig earmarked for the protection and payment of those workers. When Trig became delinquent in making its

contributions to the trust funds, the Union filed lien notices against the bond and retainage in accordance with the statutes.

B. Procedural History

The Union sued to foreclose its liens under the statutes in October 1998. Respondents Lydig and Fidelity filed a motion for summary judgment seeking dismissal of the Union's action. As one of the grounds for their motion, the respondents argued that the Union's claims were preempted by ERISA. In support of their argument, the respondents cited *Puget Sound Electrical Workers Health & Welfare Trust Fund v. Merit Co.*, 123 Wn.2d 565, 870 P.2d 960 (1994), in which the Washington Supreme Court first held that the state public works lien statutes were preempted by ERISA. (R.36-39) In opposition to the motion, the Union argued that in view of this Court's decision in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995), the trial court should disregard *Merit* and conclude that ERISA no longer preempted the statutes. (R.188-192)

The trial court entered only an order dismissing the action (App., *infra*, 24a) without any written explanation of its decision (*see* footnote 1 at page 2, *supra*). The Union filed a petition for direct review by the state Supreme Court, requesting that the court reexamine and overrule *Merit* in view of *Travelers*. The Supreme Court accepted review of the appeal.

C. Summary of Opinion Below

Five of the nine Washington Supreme Court justices found that ERISA continues to preempt the public works lien statutes, and that the court's previous decision to that effect in *Merit* remains good law.

The majority began its analysis by summarizing the reasoning underlying the *Merit* decision. In that case, the court noted that under ERISA's preemption provision, ERISA preempts any state laws that "relate to any employee benefit plan. . ." ERISA Section 514(a), 29 U.S.C. § 1144(a). Under the test stated in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), a statute "relates to" ERISA "if it has a connection with or reference to such a plan." *Shaw,* 463 U.S. at 97. The *Merit* court concluded that the lien statutes "connect with" and thus "relate to" ERISA because they "create an entirely separate cause of action against the general contractors who otherwise have no contractual obligation to the plans." *Merit,* 870 P.2d at 963-64. Thus, the statutes "provide alternative enforcement mechanisms to those provided by Congress when it enacted ERISA," and are therefore preempted. (App., *infra,* 8a)

The majority then considered whether *Merit* remains good law in view of this Court's subsequent decisions in *Travelers, supra; California Division of Labor Standards Enforcement v. Dillingham Constr., N.A.,* 519 U.S. 316 (1997); and *De Buono v. NYSA-ILA Medical & Clinical Services Fund,* 520 U.S. 806 (1997). The majority observed that in a recent prior decision, the Washington Supreme Court acknowledged that "[t]he effect of *Travelers* and its progeny favors a retreat from the expansive preemption doctrine this court has previously followed to ensure ERISA's objective of protecting workers..." *In re Estate of Egelhoff,* 139 Wn.2d 557, 989 P.2d at 87 (1999), *cert. granted,* ___ U.S. ___, 120 S.Ct. 2687, 147 L.Ed.2d 960 (2000). Nevertheless, the majority distinguished *Egelhoff* on its facts and pointed to "alternative enforcement mechanism" language in *Travelers* itself to uphold preemption of the lien statutes: "'state laws providing alternative enforcement mechanisms also relate to ERISA plans, triggering pre-emption.' *Travelers Ins. Co.,* 514 U.S. at 658, 115 S.Ct. 1671 (citing *Ingersoll-Rand Co. v. McClendon,* 498 U.S. 133, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990)." (App., *infra,* 10a)

The majority also distinguished post-*Travelers* cases in other jurisdictions finding no preemption. In each of the three cases cited, the employers themselves, and not third-party contractors, were the defendants in bond foreclosure actions, so the statutes involved did not expand ERISA remedies. *Greenblatt v. Delta Plumbing & Heating Corp.*, 68 F.3d 561 (2d Cir. 1995); *Bd. of Trustees of Operating Eng'rs Local 825 Fund Serv. Facilities v. L.B.S. Constr. Co.*, 148 N.J. 561, 691 A.2d 339 (1997); *Operating Eng'rs Health & Welfare Trust Fund v. JWJ Contracting Co.*, 135 F.3d 671 (9th Cir. 1998). The majority finally distinguished this Court's decisions in *De Buono* and *Dillingham, supra,* as factually inapposite.

The majority concluded that under the principle of stare decisis, the Union had not met its burden of clearly showing that *Merit* is sufficiently incorrect and harmful to warrant being overruled. The court found that ERISA preempts the Union's lien foreclosure action and dismissed the case accordingly. (App., *infra,* 14a)

The four dissenting justices opined that this Court, in *Travelers, supra,* abandoned the preemption analysis on which the majority relied. Further, an analysis of cases decided after *Travelers* reveals that the remedy provided by the public works lien statutes is only remotely connected to ERISA, so the Union's claim is not preempted.

The dissent pointed out that before *Travelers,* this Court relied on an expansive and literal interpretation of ERISA's preemption clause, finding that state laws having even remote effects on ERISA plans were preempted. *Shaw,* 463 U.S. at 97. But in *Travelers,* this Court retreated from and abandoned that approach, finding that state laws having only a "'tenuous, remote, or peripheral' connection with covered plans" do not merit preemption. *Travelers,* 514 U.S. at 661. State courts should now look to the "objectives of the ERISA statute as a

guide to the scope of the state law that Congress understood would survive." *Travelers,* 514 U.S. at 656. Applying these objectives in this case leads inescapably to the conclusion that Congress never intended employers to use ERISA to shield themselves from paying employee benefits.

According to the dissent, Congress enacted ERISA to remedy the "'mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds.'" *Dillingham,* 519 U.S. at 326-27, quoting *Massachussets v. Morash,* 490 U.S. 107 (1989). But Congress did not intend that ERISA preemption displace the traditional presumption against federal preemption of state law. *Travelers,* 514 U.S. at 655. Both the Ninth Circuit Court of Appeals and the Washington Supreme Court have adopted the *Travelers* analysis. *JWJ Contracting, supra,* 135 F.3d 671 (9th Cir. 1998); *Egelhoff, supra,* 139 Wn.2d 557, 989 P.2d 80 (1999), *cert. granted,* ___ U.S. ___, 120 S.Ct. 2687, 147 L.Ed.2d 960 (2000).

According to the dissenting justices, the majority erred in distinguishing *Egelhoff* from this case on the basis of the different statute involved. Rather, the result in this case differs from *Egelhoff* only because the majority applied the anachronistic pre-*Travelers* analysis that governed the decision in *Merit.* This Court has cautioned against that approach, noting the importance of giving "proper weight to *Travelers'* rejection of a strictly literal reading of § 514(a)." *De Buono,* 520 U.S. at 812-13.

The dissent also stated that the majority "seriously misrepresents" the Ninth Circuit's *JWJ Contracting* decision. (App., *infra,* 18a) Rather than affirming the continuing authority of its pre-*Travelers* decisions in *Trs. of Elec. Workers Health & Welfare Trust v. Marjo Corp.,* 988 F.2d 865 (9th Cir. 1992) and *Carpenters Health & Welfare Trust Fund v. Tri*

Capital Corp., 25 F.3d 849 (9th Cir. 1994), the *JWJ* court stated instead that the *Marjo* and *Tri Capital* decisions relied on "expansive language from the Supreme Court demonstrating an understanding of ERISA pre-emption that has since been tailored to better fit Congress's policy intentions." *JWJ Contracting,* 135 F.3d at 679.

According to the dissenting opinion, the majority upheld *Merit* primarily because *Travelers* affirmed this Court's previous holding in *Ingersoll-Rand Co. v. McClendon,* 498 U.S. 133 (1990), that ERISA preempted a Texas state law providing an alternative enforcement mechanism. *Ingersoll-Rand* is distinguishable from this case, however, because the law at issue in that case was "'specifically designed to affect employee benefit plans. . . .'", *Ingersoll-Rand,* 498 U.S. at 140. The Washington public works lien laws, on the other hand, are laws of general applicability available to an entire class of creditors, irrespective of the existence of an ERISA plan.

The dissent went on to endorse the reasoning of the Hawaii Supreme Court in finding that Hawaii's lien laws were not preempted. In *Haw. Laborers' Trust Funds v. Maui Prince Hotel,* 81 Hawaii 487, 918 P.2d 1143 (1996), the court reviewed ERISA's legislative history and concluded that preemption of the lien statutes was inconsistent with ERISA's objective of protecting workers. To rule otherwise would "ignore federal policy and fly in the face of logic." *Haw. Laborers,* 81 Hawaii at 500, 918 P.2d 1143.

In conclusion, the dissenting opinion observed that because the lien statutes are laws of general applicability having only tenuous connections to ERISA plans and making no reference to such plans, the *Merit* decision is superseded by *Egelhoff* and *Travelers.* Having failed to meet its burden to prove Congress intended to supplant Washington's lien laws,

the respondents are not entitled to a finding of ERISA preemption. (App., *infra,* 21a, 22a)

REASONS FOR GRANTING THE PETITION

The question presented in this case has been percolating through both the state and federal appellate courts for more than a decade. Nevertheless, despite the guidance provided by this Court in *Travelers, supra,* 514 U.S. 645 (1995), the courts continue to be in conflict about whether third-party lien statutes fall within ERISA's preemptive reach. Only this Court can resolve the issue to effect uniform treatment of construction industry workers, employee benefit plans, and general contractors and their sureties throughout the United States. In addition to the national importance of the issue it addresses, the close decision below is erroneous.

I. The Washington Supreme Court's Finding of Preemption Conflicts With Post-*Travelers* Decisions by the First Circuit Court of Appeals and the Hawaii Supreme Court

On June 16, 2000, only four days before the oral argument below in this case (App., *infra,* 1a), the First Circuit Court of Appeals decided *Carpenters Local Union No. 26 v. U.S. Fidelity & Guaranty Co.,* 215 F.3d 136 (1st Cir. 2000), in which it found that the Massachusetts bond statute, which is substantially similar to RCW 39.08, is not preempted by ERISA. The First Circuit reexamined its contrary decision in *Williams v. Ashland Engineering Co., Inc.,* 45 F.3d 588 (1st Cir. 1995), and concluded that in view of this Court's subsequent decisions in *Travelers, supra,* 514 U.S. 645 (1995); *Dillingham, supra,* 519 U.S. 316 (1997); and *DeBuono, supra,* 520 U.S. 806 (1997), the bond statute was no longer preempted: "Taking a fresh look at the Massachusetts bond statute and giving due weight to *Travelers* and its progeny, we conclude that USF&G [the surety

defendant] has not overcome the starting presumption against preemption." *Carpenters,* 215 F.3d at 145.

The decision below also conflicts with a post-*Travelers* state supreme court decision. In *Haw. Laborers' Trust Funds v. Maui Prince Hotel,* 81 Haw. 487, 918 P.2d 1143 (1996), the Hawaii Supreme Court examined Congress's purposes in enacting ERISA. Noting that "Congress never intended to prevent [ERISA] trust funds from using any neutral state statute that did not relate to employee benefit plans," 918 P.2d at 1155, the court concluded that Hawaii's mechanic's and materialman's lien statute was not preempted by ERISA.

Despite *Travelers,* 514 U.S. 645 (1995), the courts have reached conflicting results on the question presented since at least 1989, when the Wisconsin Court of Appeals held that the Wisconsin mechanic's lien statute was not preempted. *Plumber's Local 458 Holiday Vacation Fund v. Howard Immel, Inc.,* 445 N.W.2d 43 (Wis.App. 1989). Significantly, however, apart from only the decision below and *Plumbing Industry Bd. v. E.W. Howell Co.,* 126 F.3d 61 (2d Cir. 1997), all of the reported decisions finding preemption of third-party lien and bond statutes were issued before this Court's decision in *Travelers.*[2] With the noted exceptions, appellate decisions after

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[2] *See, e.g., Bricklayers Local 33 Benefit Funds v. America's Marble Source,* 950 F.2d 114 (3d Cir. 1991) (finding preemption of New Jersey Construction Workers' Fringe Benefit Security Act); *Trustees of the Elec. Workers Health & Welfare Trust v. Marjo Corp.,* 988 F.2d 865 (9th Cir. 1993) (finding preemption of Nevada general contractor liability statute); *Carpenters Health & Welfare Trust Fund v. Tri Capital Corp.,* 25 F.3d 849 (9th Cir. 1994) (California stop notice remedy preempted). Although *Williams v. Ashland Engineering Co., supra,* 45 F.3d 588 (1st Cir. 1995) was decided several months after this Court's decision in *Travelers,* the *Williams* court found preemption without making any reference to *Travelers.* In any event, *Williams* was overturned last year by *Carpenters v. U. S. Fidelity, supra,* 215 F.3d 136 (1st Cir. 2000), which took *Travelers* into account.

Travelers have found that these statutes are not preempted.[3]

Unless this Court provides guidance, the lower courts will continue to be split on whether lien laws are available to ERISA plans and their beneficiaries for the recovery of benefit contributions. The Court should take this opportunity to bring uniformity to a sphere of ERISA jurisprudence that currently resembles a patchwork quilt.

II. Because It Affects Thousands of Construction Industry Workers Across the United States, the Question Presented Is Important

Fundamentally at issue in this case is whether construction-industry employees who are ERISA plan beneficiaries can expect to receive their full benefits when their subcontractor employers become insolvent.[4] One commentator has observed that in 1997, approximately 29 percent of the national payroll for the construction industry consisted of benefit contributions. Of this percentage, more than eight

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[3] *See, e.g., Michigan Laborers Health Care Fund v. Seaboard Surety Co.*, 137 F.3d 427 (6th Cir. 1998) (finding no preemption of Michigan Public Works Act); *Hawaii Laborers, supra*, 918 P.2d 1143 (1996); *Carpenters v. U.S. Fidelity, supra*, 215 F.3d 136 (1st Cir. 2000).

[4] This Court has acknowledged that an ERISA pension plan must award credit to employees for hours worked regardless of whether employer contributions have been received. *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 567 n.7 (1985). But since there are no minimum participation, vesting, and benefit accrual standards for health and welfare funds, those funds are not required to provide eligibility for health coverage when contributions are not paid. Sackman, *Lien On: The Story of the Elimination and Return of Mechanic Lien, Stop Notice and Bond Remedies for Collection of Contributions to Employee Benefit Funds*, 20 Berkeley Journal of Employment and Labor Law 254, 280 n. 174 (1999).

percent of the contributions due went unpaid, for an estimated total of more than four billion dollars nationally. Sackman, *Lien On, supra,* at 282. This number would be substantially reduced, if not altogether eliminated, if the lien laws were made universally available for the recovery of unpaid contributions.

Review of the decision below is also important because it will resolve the nationwide proliferation of litigation over the question presented. If the Court decides this question, the lower courts, contractors and their sureties, and employee benefit plans and their beneficiaries need no longer devote their time and resources to this issue. The result will be a more uniform body of benefits law, which is, after all, one of the primary purposes of ERISA's preemption provision. *Ingersoll-Rand Co. v. McClendon, supra,* 498 U.S. 133, 142 (1990).

III. The 5-to-4 Decision Below Is Erroneous

As explained in the dissenting opinion of the decision below (App., *infra,* 14a-22a), the majority opinion does not fully take into account the change in ERISA preemption analysis wrought by *Travelers, supra,* 514 U.S. 645 (1995). Although *Travelers* cited to *Ingersoll-Rand Co. v. McClendon, supra,* 498 U.S. 133 (1990), for the proposition that state laws providing alternative enforcement mechanisms are preempted, *Ingersoll-Rand* is distinguishable under the *Travelers* analysis.

Under *Travelers,* courts must start with the presumption that Congress did not intend to supplant state law, and then consider the "objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Travelers,* 514 U.S. at 654, 656. Finally, state laws having only a "tenuous, remote, or peripheral" connection with ERISA plans are not preempted. *Travelers,* 514 U.S. at 661.

Ingersoll-Rand is distinguishable from this case because it involved a common-law wrongful termination cause of action based on an employer's desire to prevent his employee from acquiring pension benefits under an ERISA plan. *Ingersoll-Rand,* 498 U.S. at 137-39. The cause of action was therefore "specifically designed to affect employee benefit plans," *Ingersoll-Rand,* 498 U.S. at 140, in contrast to the lien statutes, which are laws of general application having only a remote connection with ERISA. Under *Travelers,* these characteristics trump the statutes' status as an alternative enforcement mechanism, so they are not preempted.

Further, the decision below is erroneous because it defies the intentions of Congress in enacting ERISA. The statute itself declares that "the policy of [ERISA is] to protect . . . the interests of participants in employee benefit plans. . . ." ERISA § 2(b), 29 U.S.C. § 1001(b). Preemption of ERISA-neutral state lien laws only hampers those interests. Moreover, the legislative history underlying the Multiemployer Pension Plan Amendments Act of 1980, codified at ERISA § 515, 29 U.S.C. § 1145, underscores Congress's intention that traditional statutory lien remedies not be preempted: "The Committee amendment does not change any other type of remedy permitted under State or Federal Law with respect to delinquent multiemployer plan contributions." H.R. Rep. No. 869, 96 Cong., 2d Sess. (1986) (Part II), reprinted in 1980 U.S. Code Cong. & Admin. News 2918, 3037-38. The Court should therefore embrace this opportunity to align its ERISA preemption analysis with Congress's policy intentions.

Finally, the decision below is erroneous because it subjects employees on public works projects who are ERISA plan participants to disparate treatment in comparison with non-ERISA employees. The latter are typically nonunion employees entitled under the prevailing wage statutes to compensation comprising both wages and benefits. The former category

consists primarily of unionized employees who receive wages in accordance with a collective bargaining agreement and benefits from ERISA plans funded by employer contributions. When ERISA trust funds are denied the use of the lien statutes to recover unpaid contributions, the practical effect is to deny union employees the value of health and other benefits that nonunion employees are entitled to recover under the prevailing wage statutes. Because this disparate treatment is wrong as a matter of public policy, the Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A
TO
PETITION FOR CERTIORARI

OPINION OF
THE SUPREME COURT OF THE STATE OF
WASHINGTON

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 46,
Appellant,

v.

TRIG ELECTRIC CONSTRUCTION CO., a Washington corporation; LYDIG CONSTRUCTION, INC.; FIDELITY AND DEPOSIT COMPANY OF MARYLAND; and DEPARTMENT OF GENERAL ADMINISTRATION,
Respondents.

No. 68504-5

En Banc

Argued June 20, 2000
Decided November 16, 2000

SANDERS, J. — We here review an order of the King County Superior Court granting the motion of Lydig Construction Company and the Fidelity and Deposit Company of Maryland to dismiss the complaint of the International Brotherhood of Electrical Workers on summary judgment. Finding no issue of material fact and holding Lydig and Fidelity are entitled to judgment as a matter of law, we affirm the trial court's dismissal of appellant's claim on federal preemption grounds.

FACTS

Background

Appellant is Local Union No. 46 of the International Brotherhood of Electrical Workers (IBEW). Respondents are Lydig Construction, Inc. (Lydig), Fidelity and Deposit Company of Maryland (Fidelity), and Washington State Department of General Administration (GA). Trig Electrical Construction Co. (Trig) was Lydig's subcontractor. IBEW seeks to foreclose Lydig's general contractor's bond posted by Fidelity.

Lydig is a general construction contractor and has been doing business for over 40 years. It has been responsible for several notable building projects at leading educational institutions in this state. At issue here is Lydig's contract to build the State Archives Project at Bellevue Community College. Trig subcontracted with Lydig to perform the project's electrical work.

As required by RCW 39.08, Lydig acquired a surety bond from Fidelity to protect all workers, mechanics, subcontractors, and materialmen supplying material and performing labor on the project. Pursuant to RCW 60.28, the college withheld a portion of the contract price as a retainage trust fund.

A collective bargaining agreement between IBEW and Trig required Trig to contribute a portion of its workers' wages to benefit trust fund plans falling under the ambit of the federal Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461. Trig became delinquent on these contributions for the months of December 1997 and January 1998.

On March 24, 1998, IBEW filed a lien notice asserting a claim against Lydig's bond and retainage trust fund for Trig's unpaid employee benefit contributions. On July 22, 1998, IBEW filed an amended lien notice identical to the previous notice except for the amount of interest and attorney fees claimed.

Procedural History

IBEW filed its lien foreclosure action against Lydig on October 27, 1998, for the required but unpaid contributions to the employee benefit funds. On July 9, 1999, Lydig and Fidelity moved for summary judgment arguing IBEW had no standing to foreclose on the lien and that ERISA preempted the action in any event. On August 6, 1999, the trial court granted defendants' motion for summary judgment and dismissed IBEW's complaint on the grounds that the lien notices were deficient and IBEW lacked standing to sue on behalf of Trig employees. IBEW timely filed a notice of appeal to the Supreme Court and we accepted review of this direct appeal.

ISSUE[1]

The dispositive issue before the court is whether ERISA preempts IBEW's lien foreclosure action under *Puget Sound Elec. Workers Health & Welfare Trust Fund v. Merit Co.*, 123 Wn.2d 565, 870 P.2d 960 (1994), and if so, should we overrule *Merit*?

DISCUSSION

Standard of Review on Summary Judgment

It is well settled that we review the record on summary judgment de novo, engaging in the same inquiry as the trial court. *Benjamin v. Wash. State Bar Ass'n*, 138 Wn.2d 506, 515, 980 P.2d 742 (1999). Because our review is de novo, we are free to premise our holding affirming summary judgment on an issue not decided by the trial court. *See Redding v. Va. Mason Med. Ctr.*, 75 Wn.App. 424, 426, 878 P.2d 483 (1994) (an appellate court may affirm a trial court's disposition of a summary judgment motion on any basis supported by the record); *see also LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993); CR 56(c).

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[1] IBEW assigns error generally to the trial court's dismissal of its case in summary judgment. While the parties brief the specific grounds for which the trial court granted summary judgment, viz., that IBEW lacked standing to bring the foreclosure action under RCW 39.08 and RCW 60.28, *see* Clerk's Papers (CP) at 215-16 (Memorandum Decision), the standing issue is not essential to our holding. We therefore pass to the ERISA preemption question.

There are no disputed material facts in this case. Rather we must determine a pure question of law: whether ERISA preempts IBEW's lien foreclosure action, which question turns on the continued validity of *Merit*. As counsel for Appellant conceded at oral argument, we must overrule *Merit* for IBEW to prevail.

The Continuing Validity of Merit

In a factually similar matter, this court six years ago unanimously held Washington's public works lien statutes, RCW 39.08 and RCW 60.28, which provide a mechanism for collection of a defaulting subcontractor's obligations from the general contractor, are preempted by ERISA. *Merit,* 123 Wn.2d 565, 870 P.2d 960.

RCW 39.08 requires the execution and delivery of a performance bond with respect to public works construction projects:

> Whenever any . . . body acting for the state or any county or municipality or any public body shall contract with any person or corporation to do any work for the . . . municipality, or other public body, city, town, or district, such . . . body shall require the person or persons with whom such contract is made to make, execute, and deliver to such . . . body a good and sufficient bond, with a surety company as surety, conditioned that such person or persons shall faithfully perform all the provisions of such contract and pay all laborers, mechanics, and subcontractors and materialmen, and all persons who supply such person or persons, or subcontractors, with provisions and supplies for the carrying on of such work, which bond in cases of cities and towns shall be filed with the clerk or comptroller thereof, and any person or

> persons performing such services or furnishing material to any subcontractor shall have the same right under the provisions of such bond as if such work, services or material was furnished to the original contractor. . . .

RCW 39.08.010. Relating thereto, RCW 60.28 requires the public body reserve a retainage fund from the money otherwise due the general contractor:

> Contracts for public improvements or work, other than for professional services, by the state, or any county, city, town, district, board, or other public body, herein referred to as "public body," shall provide, and there shall be reserved by the public body from the moneys earned by the contractor on estimates during the progress of the improvement or work, a sum not to exceed five percent, said sum to be retained by the state, county, city, town, district, board, or other public body, as a trust fund for the protection and payment of any person or persons, mechanic, subcontractor or materialman who shall perform any labor upon such contract or the doing of said work, and all persons who shall supply such person or persons or subcontractors with provisions and supplies for the carrying on of such work. . . . Every person performing labor or furnishing supplies toward the completion of said improvement or work shall have a lien upon said moneys so reserved: . . . .

RCW 60.28.010(1).

Section 514(a) of ERISA states with respect to state laws:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and

> subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

29 U.S.C. § 1144(a)(1994). Furthermore, "[t]he term 'State law' includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." 29 U.S.C. § 1144(c)(1).

In *Merit,* a group of benefit trust funds sued, as does IBEW herein, under RCW 39.08 and RCW 60.28 to foreclose on a lien against a general contractor's bond for unpaid benefit plan contributions owed to employees by an insolvent subcontractor. *Merit,* 23 Wn.2d at 567-68, 870 P.2d 960. We held the lien foreclosure actions were preempted by ERISA. *Id.* at 573, 870 P.2d 960.

To determine whether the public works lien statutes "relate to" ERISA for the purposes of 29 U.S.C. § 1144(a), we looked to the test of *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983). Under *Shaw*, a statute may "relate to" ERISA "if it has a connection with or reference to such a plan." *Shaw*, 463 U.S. at 97, 103 S.Ct. 2890.

We believed the Washington public works lien statutes "connect with" and therefore "relate to" ERISA because they

> create an entirely separate cause of action against the general contractors who otherwise have no contractual obligation to the plans. Furthermore, they provide a mechanism for funding employee benefit plans not available under the provisions of ERISA.

Merit, 123 Wn.2d at 572, 870 P.2d 960. Therefore the "enforcement and collection mechanisms [of the lien statutes] must yield to the extent they supplement those provided by ERISA." *Id.* at 573, 870 P.2d 960.

The civil enforcement mechanisms of ERISA are set forth at 29 U.S.C. § 1132 (1994) and specifically empower a participant, beneficiary, or fiduciary of a benefit plan to bring a civil action to enforce the terms of the plan. 29 U.S.C. § 1132(a)(3)(B)(ii)(1994). Furthermore 29 U.S.C. § 1145 governs delinquent contributions *by employers* to employee benefit plans as set forth in collective bargaining agreements. In a nonpreempted enforcement action, then, a party would use 29 U.S.C. § 1132(a) to enforce 29 U.S.C. § 1145 against the delinquent employer.

As we understood in *Merit,* to the extent the public works lien statutes provide an enforcement mechanism by imposing liabilities on general contractors' bonds and retainage funds for the delinquent benefit plan payments of a subcontractor, they provide alternative enforcement mechanisms to those provided by Congress when it enacted ERISA. The state statutes, then, undeniably "relate to" and "connect with" ERISA for the purposes of ERISA's preemption provision. 29 U.S.C. § 1144(a) (1994).

Under the holding of *Merit,* then, IBEW's action to enforce and collect on its lien against Lydig and Fidelity for Trig's delinquent payments into the employee benefit funds is preempted by ERISA. As noted above, IBEW's counsel conceded as much at oral argument. The question is, then, have subsequent developments in the law occurred which undermine our holding in *Merit*? IBEW argues both the United States Supreme Court and the Washington Supreme Court have departed from the strict rule of *Merit* that alternate enforcement

mechanisms are preempted. Lydig and Fidelity argue *Merit* remains good law.

Not long after *Merit*, the United States Supreme Court in a series of cases attempted to develop a more helpful framework than *Shaw's* "refer to or connect with" test. IBEW cites *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995) for the proposition that the Supreme Court jettisoned a broad interpretation of ERISA preemption. Indeed, the Supreme Court later harkened back to *Travelers* for the proposition Congress in enacting ERISA's preemption clause did not intend to supplant existing state law. *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 117 S.Ct. 1747, 138 L.Ed.2d 21 (1997) (citing *Travelers Ins. Co.*, 514 U.S. at 654-55). IBEW argues that after *Travelers*, overruling *Merit* would simply restore the status quo ante with respect to the public works lien statutes and employee benefit plans.

Last fall, in *In re Estate of Egelhoff*, 139 Wn.2d 557, 989 P.2d 80 (1999), *cert. granted*, 120 S.Ct. 2687 (2000), we took up the issue of whether ERISA preempted a Washington statute (RCW 11.07.010) giving children of decedents rights to the proceeds of employment-based life insurance plans. After a detailed analysis of the federal case law prior to and since *Travelers* we concluded, "The effect of *Travelers* and its progeny favors a retreat from the expansive preemption doctrine this court has previously followed to ensure ERISA's objective of protecting workers and Washington's sovereign interest in exercising its traditional police powers in the area of domestic relations and family law." *Egelhoff*, 139 Wn.2d at 570-71, 989 P.2d 80. This language (". . . the expansive preemption doctrine this Court has previously followed . . . .") bears on the validity of *Merit* by implication.

However IBEW places a great deal of emphasis on this kind of retreat language without analyzing the salient features of this case vis-à-vis *Travelers, Egelhoff,* and the cases from other jurisdictions which arguably retreat from a broad reading of ERISA's preemption language.

Travelers itself expressly contemplates ERISA preemption in a case such as this where a state statute provides an enforcement mechanism for funding an ERISA plan supplemental to the provisions of ERISA itself. In *Travelers,* the Supreme Court expressly noted "state laws providing alternative enforcement mechanisms also relate to ERISA plans, triggering pre-emption." *Travelers Ins. Co.,* 514 U.S. at 658 (citing *Ingersoll-Rand Co. v. McClendon,* 498 U.S. 133, 111 S. Ct. 478, 112 L.Ed.2d 474 (1990)). *Travelers Ins. Co.,* the case on which IBEW would have us overrule *Merit,* actually reaffirms the appropriateness of ERISA preemption in this kind of case.

Furthermore, *Egelhoff* is distinguishable from this case because here our task, as in *Merit,* involves delving into the relationship between Washington's public works lien statutes and ERISA, not the statute dealing with the distribution of nonprobate assets upon dissolution of marriage.

Even *Egelhoff* noted the distinction between it and those cases where "a state law which directly or indirectly invades the core functions of ERISA regulation must give way to the comprehensive federal scheme favored by Congress under the four-factor approach of the Court of Appeals for the Ninth Circuit." *Egelhoff,* 139 Wn.2d at 575 n.93, 989 P.2d 80 (referencing identification of "four factors to determine whether a state law has a 'connection with' an ERISA benefit plan. . . .") (citing *Aloha Airlines, Inc. v. Ahue,* 12 F.3d 1498, 1504 (9th Cir. 1993)).

After an analysis of the same "connection with" case the Ninth Circuit followed in *Aloha Airlines,* we decided in *Merit* that RCW 39.08 and RCW 60.28 manifest a substantive invasion into the field ERISA occupies by creating a separate cause of action against general contractors otherwise without liability to the employees of a subcontractor under the benefit plans and by providing a non-ERISA enforcement mechanism for funding the plans. *Merit,* 123 Wn.2d at 572, 870 P.2d 960. Nothing in substantive ERISA law has changed in the intervening years between *Merit* and this case that alters our conclusion. As noted above, the public works lien statutes "directly or indirectly invade[ ] the core functions of ERISA regulation" by providing a civil enforcement mechanism beyond what Congress specified in ERISA. *See generally* 29 U.S.C. § 1132(a)(3).

Post-*Travelers* ERISA preemption decisions in other jurisdictions upon which IBEW relies are equally unpersuasive.

Several cases upon which IBEW relies involve general contractors liable on their bonds *as employers. See Greenblatt v. Delta Plumbing & Heating Corp.,* 68 F.3d 561 (2d Cir. 1995) (ERISA did not preempt a surety bond claim against an employer's bond to enforce the terms of a collective bargaining agreement when employer was delinquent on benefit payments). However the Second Circuit noted, "Pre-emption may be proper, for example, when state laws 'mandate[ ] employee benefit structures or their administration' or '*provid[e] alternative enforcement mechanisms*' to § 502(a)." *Greenblatt,* 68 F.3d at 574 (alteration in original) (emphasis added) (quoting *Travelers Ins. Co.,* 514 U.S. at 658). *See also Bd. of Trustees of Operating Eng'rs Local 825 Fund Serv. Facilities v. L.B.S. Constr. Co.,* 148 N.J. 561, 691 A.2d 339 (1997) (ERISA did not preempt foreclosure action against a general contractor's bond for the general contractor's delinquent payments to a fringe benefit plan); *Operating Eng'rs Health & Welfare Trust Fund v.*

JWJ Contracting Co., 135 F.3d 671 (9th Cir. 1998) (same). These cases are distinguishable because the bond foreclosure actions were against the delinquent employers themselves and did not attempt to shift liability to fund an ERISA plan to a third party. There is a significant difference between plaintiffs enforcing their rights against their employer's bond as opposed to applying a state lien law to recover benefit contributions from a third party to the contract rather than enforce rights under a contract.

Notably, the Ninth Circuit in *JWJ* distinguished itself from a case like ours:

> The statutes involved in both *Marjo* and *Tri Capital* provided remedies against third parties who never directly agreed to make contributions to ERISA trust funds when the employer failed to do so. By making additional parties liable to plan employees, these state statutes expand remedies by offering additional substantive mechanisms beyond what was contemplated by ERISA to solve the problem for which ERISA was created. In contrast, as JWJ's surety, Continental's contractual agreement to issue payment bonds transfers the obligation from the employer to its underwriter, for the protection of employees, and does not expand the remedies provided or contemplated by ERISA. This contractual relationship merely substitutes obligors.

JWJ Contracting Co., 135 F.3d at 679. Yet, as we succinctly described in *Merit:*

> By imposing liability upon general contractors who have not agreed to make contributions to ERISA funds, Washington's public works lien statutes regulate how ERISA plans are funded. Consequently,

> they relate to ERISA benefit plans and the provisions of ERISA that address the nonpayment of contributions by employers to employee benefit plans.

Merit, 123 Wn.2d at 572, 870 P.2d 960.

Some recent United States Supreme Court cases cited by IBEW, and upon which we relied in *Egelhoff*, 139 Wn.2d at 569-70, 989 P.2d 80, are simply inapposite. *See, e.g., De Buono*, 520 U.S. 806, 117 S.Ct. 1747, 138 L.Ed.2d 21 (ERISA does not preempt a New York state gross receipts tax on hospitals); *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 117 S. Ct. 832, 136 L. Ed. 2d 791 (1997) (ERISA does not preempt a California statute prohibiting a contractor on a public works project from paying an apprentice wage to an apprentice trained in an unapproved apprenticeship program). These cases differ from the instant case because, insofar as a lien foreclosure action under our public works lien statutes permits an alternative funding mechanism for the ERISA plans, such interferes with their administration well beyond the disparate fact patterns before the Supreme Court in *De Buono* and *Dillingham*.

In sum, the post-*Merit* and post-*Travelers* authority IBEW cites simply do not take this case outside of the preemptive scope of ERISA as recognized explicitly even in *Travelers* itself.

Stare Decisis

Stare decisis "'requires a clear showing that an established rule is incorrect and harmful before it is abandoned.'" *Waremart, Inc. v. Progressive Campaigns, Inc.*, 139 Wn.2d 623, 634, 989 P.2d 524 (1999) (quoting *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)). By failing to demonstrate a change in ERISA's preemptive force

over state statutes providing an alternative enforcement mechanism to 29 U.S.C. § 1132(a), IBEW has not met this substantial burden. *Merit* remains good law.

CONCLUSION

Accordingly we decline IBEW's invitation to overrule *Merit*. We hold ERISA preempts the union's lien foreclosure action against Lydig and Fidelity to enforce Trig's duty under federal law to make payments to its unionized employee's ERISA-governed benefit plans. We affirm the trial court's summary judgment order and dismiss the case. Respondents shall recover their costs on appeal.

GUY, C.J., MADSEN, ALEXANDER, and BRIDGE, JJ., concur.

JOHNSON, J. (dissenting) — The majority relies upon a preemption analysis the United States Supreme Court has abandoned. *See N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 115 S. Ct. 1671, 131 L. Ed.2d 695 (1995). Applying the wrong analytical approach, the majority erroneously concludes that a case decided prior to *Travelers* is determinative. *See* majority at 625 (citing *Puget Sound Elec. Workers Health & Welfare Trust Fund v. Merit Co.*, 123 Wn.2d 565, 870 P.2d 960 (1994)). Moreover, in an attempt to strengthen its result, the majority relies upon cases that do not support its conclusion. A careful analysis of case law following *Travelers* reveals, however, that the right of the International Brotherhood of Electrical Workers (IBEW) to collect compensation owed to its members under the public works lien laws is only remotely connected to ERISA. Employee Retirement Income Security Act of 1974, Pub. L.

No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001-1461) (ERISA). The claim in this case is not preempted.

Under 29 U.S.C. § 1144, all state laws are preempted to the extent they "relate to" any ERISA benefit plan. Prior to *Travelers,* the United States Supreme Court interpreted ERISA's preemption clause expansively. *See Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983). The pre-*Travelers* approach determined that a state law related to an employee benefit plan if it had a connection with or made reference to such a plan. *Shaw,* 463 U.S. at 97, 103 S.Ct. 2890. Relying upon an expansive and literal interpretation, the Court found that state laws having even remote effects on ERISA plans related to them and were preempted. *Shaw,* 463 U.S. at 97, 103 S.Ct. 2890; *see also In re Estate of Egelhoff,* 139 Wn.2d 557, 567 nn. 43-45, 989 P.2d 80 (1999) (citing cases decided under a broad interpretation), *cert. granted,* 120 S. Ct. 2687 (2000). Under the supremacy clause, we were required to apply the Court's analysis to determine preemption.

The United States Supreme Court has since retreated from and abandoned such an expansive reading of ERISA's text. Attempting to limit the seemingly endless reach the broad interpretation of "relates to" could yield, the *Travelers* Court determined that state laws with only a "'tenuous, remote, or peripheral' connection with covered plans" do not merit preemption. *Travelers,* 514 U.S. at 661 (quoting *District of Columbia v. Greater Wash. Bd. of Trade,* 506 U.S. 125, 130 n.1, 113 S.Ct. 580, 121 L.Ed.2d 513 (1992)). The Court noted that state courts should now look to the "objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Travelers,* 514 U.S. at 656. Looking to these objectives and applying them in this case, the inescapable conclusion is that Congress never intended ERISA to serve as a shield for an employer to raise in order to prevent

its employees from collecting benefits owed them by that employer.

A primary concern of Congress when enacting ERISA was the "'mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds.'" *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., Inc.*, 519 U.S. 316, 326-27, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997) (quoting *Massachusetts v. Morash*, 490 U.S. 107, 115, 109 S.Ct. 1668, 104 L.Ed.2d 98 (1989)). To remedy this mismanagement, Congress enacted comprehensive regulations that permitted the nationally uniform administration of employee benefit plans. *Travelers*, 514 U.S. at 657. It was not, however, Congress' intention to create a law with such broad preemption powers so as to displace the traditional presumption against federal preemption of the state law. *Travelers*, 514 U.S. at 655. Under *Travelers*, when analyzing the connection between state law and ERISA regulations, courts must now apply the more common approach to preemption, starting with the presumption that Congress does not intend to supplant state law. *Travelers*, 514 U.S. at 654. This significantly narrows the scope of state law that is preempted.

Both the Ninth Circuit Court of Appeals and this court have recognized this new approach and have adopted the *Travelers* analysis. *Egelhoff*, 139 Wn.2d at 579, 989 P.2d 80 (ERISA does not preempt Washington's dissolution laws when determining life insurance and pension plan beneficiaries); *see Operating Eng'rs Health & Welfare Trust Fund v. JWJ Contracting Co.*, 135 F.3d 671 (9th Cir. 1998). In *Egelhoff*, we stated, "[t]he effect of *Travelers* and cases following justify retreat from the expansive preemption doctrine our court has previously followed to ensure ERISA's objective of protecting workers...." *Egelhoff*, 139 Wn.2d at 580, 989 P.2d 80. In the

present case, however, the majority minimizes the importance of *Egelhoff.*

> *Egelhoff* is distinguishable from this case because here our task, as in [*Puget Sound Electrical Workers*], involves delving into the relationship between Washington's public works lien statutes and ERISA, not the statute dealing with the distribution of nonprobate assets upon dissolution of marriage.

Majority at 626. The majority superficially contrasts *Egelhoff* with *Puget Sound Electrical Workers,* based solely on the types of laws at issue. By doing so, the majority concludes *Puget Sound Electrical Workers* is determinative and *Egelhoff* does not have any bearing on this case. *See* majority at 626. I disagree.

A significant difference between *Puget Sound Electrical Workers* and *Egelhoff* exists that goes beyond the types of laws at issue in each case. In each of those cases, a very different preemption analysis was applied, which led to the different results. In *Puget Sound Electrical Workers,* we applied a broad, expansive interpretation of ERISA's § 514(a), which we were required to do under *Shaw. Puget Sound Elec. Workers,* 123 Wn.2d at 568-69, 573, 870 P.2d 960; *see Shaw,* 463 U.S. at 95-98. In *Egelhoff,* we applied the narrower *Travelers* approach. By disregarding this shift in ERISA preemption, the majority avoids any meaningful application of the post-*Travelers* doctrine and reaches a conclusion inconsistent with current law.

The United States Supreme Court has cautioned against such an anachronistic approach. In reversing a decision of the Second Circuit Court of Appeals, the Court noted that the lower court "fail[ed] to give proper weight to *Travelers'* rejection of a strictly literal reading of § 514(a)." *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund,* 520 U.S. 806, 812-13, 117 S. Ct. 1747, 138 L.Ed.2d 21 (1997) (state tax on gross receipts of

health care facilities was not preempted by ERISA). The majority makes the same mistake here.

The majority also discounts the Ninth Circuit's application of *Travelers*. *See JWJ Contracting Co.*, 135 F.3d 671. The majority cites to *JWJ Contracting* for the proposition that state laws providing remedies against third parties are preempted because those laws offer additional enforcement mechanisms. Majority at 627. That was the conclusion the Ninth Circuit reached in two pre-*Travelers* cases. *See Trs. of Elec. Workers Health & Welfare Trust v. Marjo Corp.*, 988 F.2d 865 (9th Cir. 1992); *Carpenters Health & Welfare Trust Fund v. Tri Capital Corp.*, 25 F.3d 849 (9th Cir. 1994). While those cases were correctly decided under *Shaw*, they are no longer good law.

The majority seriously misrepresents the Ninth Circuit's decision in *JWJ Contracting*. There, the defendants argued that the Ninth Circuit's pre-*Travelers* rulings were still good law and should be followed. While the Ninth Circuit agreed with the defendants' assertion that the statutes in *Marjo* and *Tri Capital* were preempted because the statutes in both provided remedies against third parties, it in no way affirmed the continuing control of those cases. *JWJ Contracting Co.*, 135 F.3d at 679. In fact, the court implied just the opposite, stating the *Marjo* and *Tri Capital* decisions relied on "expansive language from the Supreme Court demonstrating an understanding of ERISA pre-emption that has since been tailored to better fit Congress's policy intentions." *JWJ Contracting Co.*, 135 F.3d at 679.

The majority's misguided assessment of *JWJ Contracting* enables it once again to remain wholly unaccountable to the fundamental shift in preemption analysis. Avoiding this, the majority relies heavily upon a case decided under the pre-*Travelers* doctrine to determine the outcome in this case, thus leading it further astray.

The continuing viability of *Puget Sound Electrical Workers* serves as the linchpin of the majority's ruling. The majority cites this case for the proposition that the public works lien statutes at issue here provide an alternative funding mechanism and, therefore, are preempted under ERISA. Majority at 625. The majority concludes that *Puget Sound Electrical Workers'* continued authority is evidenced by the fact the *Travelers* Court reaffirmed its previous holding in *Ingersoll-Rand Co. v. McClendon,* 498 U.S. 133, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990). In *Ingersoll-Rand,* the United States Supreme Court held that a Texas state law providing an alternative enforcement mechanism was preempted. *Ingersoll-Rand Co.,* 498 U.S. at 139-40. However, the Texas law involved a direct connection with ERISA rather than a remote one, as is the case here. Thus, the majority has misapplied *Travelers.*

At issue in *Ingersoll-Rand* was whether a common law cause of action in Texas for wrongful termination due to an employer's desire to avoid contributing to an employee's pension fund "related to" employee benefit plans. *Ingersoll-Rand Co.,* 498 U.S. at 137-39. The Supreme Court ruled that it did. The decision turned on the fact that the existence of an ERISA plan was a critical factor in establishing liability. *Ingersoll-Rand Co.,* 498 U.S at 139-40. The majority fails to recognize that the *Ingersoll-Rand* decision was premised on the fact that the law was "'specifically designed to affect employee benefit plans. . . .'" *Ingersoll-Rand Co.,* 498 U.S. at 140 (quoting *Mackey v. Lanier Collection Agency & Serv., Inc.,* 486 U.S. 825, 829, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988)). The connection was direct and substantial. However, that was not the case in *Puget Sound Electrical Workers,* and is not the case here.

The public works lien laws at issue in *Puget Sound Electrical Workers* and in this case are laws of general

applicability that are used by a class of creditors regardless of whether there is an ERISA plan. Thus, *Travelers'* reaffirmation of *Ingersoll-Rand's* holding has no bearing on whether *Puget Sound Electrical Workers* is good law.

Ingersoll-Rand expressly distinguished the Texas state cause of action from a "generally applicable statute that makes no reference to, or indeed functions irrespective of, the existence of an ERISA plan." *Ingersoll-Rand Co.*, 498 U.S. at 139. The Supreme Court pointed to its previous decision in *Mackey* (holding § 514(a) did not preempt a state's general garnishment procedures) to demonstrate that, even under its broadest reading, § 514 did not preempt a state's generally applicable statute that had only a tenuous connection with covered plans. *Ingersoll-Rand Co.*, 498 U.S. at 139-40. This is the exact situation we are presented with here. The public works lien laws are generally applicable statutes available to an entire class of creditors, regardless of whether an ERISA plan exists.

Other courts reviewing the use of lien laws to collect delinquent ERISA fund contributions from third parties have also drawn an analogy between the issues in those cases and the *Mackey* decision:

> "The United States Supreme Court has held that Congress did not intend to prohibit the use of state law garnishment procedures to execute judgments against ERISA benefit plans. *Mackey,* 486 U.S. at 831-32. If plans may use state law to collect on a judgment against a plan, certainly ERISA does not preempt the plan's ability to use those procedures to collect a judgment on behalf of the plan."

Haw. Laborers' Trust Funds v. Maui Prince Hotel, 81 Haw. 487, 497, 918 P.2d 1143 (1996) (quoting *Plumber's*

Local 458 Holiday Vacation Fund v. Howard Immel, Inc., 151 Wis.2d 233, 238-39, 445 N.W.2d 43 (Ct.App. 1989)).

Similarly, after thoroughly reviewing the congressional intent behind ERISA, the Hawaii Supreme Court held that disallowing the use of lien laws to collect delinquent ERISA fund contributions was inconsistent with ERISA's objective of protecting workers. *Haw. Laborers' Trust Funds,* 81 Haw. at 497-500. Ruling any other way, the Hawaii Supreme Court reasoned, would "ignore federal policy and fly in the face of logic." *Haw. Laborers' Trust Funds,* 81 Haw. at 500, 918 P.2d 1143. I agree.

In this case, the lien laws are laws of general applicability. They have only tenuous connections with ERISA plans. Under *Travelers,* such a connection is not enough to overcome the presumption that Congress does not intend to supplant state law. Therefore, this court's decision in *Puget Sound Electrical Workers* is no longer instructive and, to the extent it is no longer good law, is superseded by *Egelhoff* and *Travelers.*

The IBEW is attempting to collect funds owed to the employees. The public works lien statutes at issue here are generally applicable. They make no reference to an ERISA plan. The statute creates a procedural mechanism which is available to a class of creditors. Such laws often have only a "'tenuous, remote, or peripheral' connection with covered plans." *Travelers,* 514 U.S. at 661 (quoting *Greater Wash. Bd. of Trade,* 506 U.S. at 130 n.1). It is Trig's burden to prove Congress intended to supplant Washington's lien laws. *See De Buono,* 520 U.S. at 814 (party asserting ERISA preemption bears a considerable burden of proving that Congress intended to preempt state law). Reliance upon outdated precedence does not suffice to meet this burden.

Using "the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive," *Travelers*, 514 U.S. at 656, Congress did not intend to foreclose to employees established procedures for collecting benefits owed them. I would hold that the employees' right to collect the benefits owed them has no direct connection to ERISA and preemption does not apply.

SMITH, TALMADGE, and IRELAND, JJ., concur.

APPENDIX B
TO
PETITION FOR CERTIORARI

ORDER GRANTING SUMMARY JUDGMENT
King County Superior Court

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 46,
Plaintiff,

v.

TRIG ELECTRIC CONSTRUCTION CO., a Washington Corporation; LYDIG CONSTRUCTION, INC.; FIDELITY AND DEPOSIT COMPANY OF MARYLAND; and DEPARTMENT OF GENERAL ADMINISTRATION,
Defendants.

No. 98-2-26652-0 SEA

Entered August 6, 1999

THIS MATTER came before the Court on the motion of defendants Lydig Construction, Inc. and Fidelity and Deposit Company of Maryland to dismiss the complaint of the plaintiff with prejudice. In support of the motion, the moving defendants filed their motion, the declaration of William G. Gottschalk and the declaration of John Parnass. In opposition to the motion, the plaintiff filed Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment, the Declaration of Michael H. Korpi, and the Affidavits of David B. Clements and Steve B. Hawke. By way of reply, the moving parties filed their Reply Brief in Support of Motion for Summary Judgment. Having reviewed the records and files herein and having heard oral argument of counsel, the Court hereby concludes that the motion should be granted and that, accordingly, it is hereby

ORDERED that the motion is hereby GRANTED and that the complaint of the plaintiff in this action is hereby DISMISSED WITH PREJUDICE.

DONE IN OPEN COURT this 6th day of August, 1999.

/s/_____
Honorable R. Joseph Wesley
Superior Court Judge

Presented by:

Davis Wright Tremaine LLP
Attorneys for Defendants Lydig Construction, Inc.
and Fidelity and Deposit Company of Maryland
By /s/_____
John Parnass, WSBA #18522

Copy received:
/s/_____
Michael H. Korpi, WSBA #12711
For plaintiff